NO. 37115-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE THE WELFARE OF B.S., J.S., A.S., A.M.S., T.S., C.S., and A.B.

STATE OF WASHINGTON,
Respondent,

v.

T.L.S.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jay B. Roof, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Findings of Fact 5, 9, and 10.[1]

2. The trial court erred in concluding that the state proved by a preponderance of the evidence that the children are dependent.

Issue pertaining to assignments of error

Where the evidence failed to show that any parental deficiency created a danger of substantial damage to the physical or emotional development of the children, must the order of dependency be reversed?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant T.L.S. is the mother of B.S. (born 1/20/92), J.S. (born 9/23/93), A.S. (born 10/24/95), A.M.S. (born 11/5/07), T.S. (born 12/16/99), C.S. (born 12/11/01), and A.B. (born 5/16/06). On February 2, 2007, the Department of Social and Health Services filed petitions alleging that the children were dependent under RCW 13.34.030(5)(c). CP 28-34, 78-84, 96-102, 113-120, 133-139, 152-158, 171-177. The case proceeded to a fact finding hearing in Kitsap County Superior Court

[1] The court's Findings of Fact, Conclusions of Law and Order of Dependency are attached as an appendix to this brief.

before the Honorable Jay B. Roof, and the court granted the dependency petitions. CP 14-19. T.L.S. filed this timely appeal. CP 20-21.

2. Substantive Facts

In 2003, T.L.S.'s daughter, A.M.S., disclosed that her father had molested her. 1RP[2] 41. T.S. made a similar disclosure to T.L.S. 2RP 308. T.L.S. confronted her husband, and when he admitted the inappropriate touching, she immediately packed up her six children and left. 1RP 30, 42-43. Her husband was prosecuted for sexual contact with his daughters, and T.L.S. divorced him. 1RP 29; 2RP 337.

In 2005, T.L.S. began a relationship with M.B., and they had a child together in 2006. 1RP 31. M.B. also has six children from a previous marriage. In 2004, M.B.'s two oldest daughters made allegations against him. The oldest daughter accused him of peeping at her while she was in the shower. 1RP 113. M.B. was charged with voyeurism, but he was acquitted after a jury trial. 1RP 135. The next daughter accused him of going into her bedroom and touching her under her underwear, although her story changed several times. 1RP 116. Eventually, to spare his daughter from the ordeal of a trial, M.B. entered a pretrial diversion agreement to a charge of domestic violence fourth degree assault, under

[2] The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—10/16/07; 2RP—10/17/07; 3RP—10/19/7; 4RP 11/16/07.

which the charge would be dismissed following a two year probation period. 1RP 116-17, 140.

T.L.S. knew about the allegations against M.B., and she was concerned for her children, not wanting them to go through what they went through with their father. 1RP 28, 30. She had done research after the incident with her former husband, educating herself about issues confronting children who have been sexually abused. 1RP 44. She informed herself about the circumstances of the allegations against M.B. by reading police reports and court documents and attending hearings with him. 1RP 45. She also took precautions not to leave her children alone with M.B. and observed his interactions with her children for a long time. 1RP 45. No allegations were ever made that M.B. was inappropriate with T.L.S.'s children, and T.L.S. never saw any red flags to indicate a problem. 1RP 64-65.

The parenting plan between M.B. and his ex-wife included protection orders limiting M.B.'s contact with his children. 2RP 185. By the end of 2006, M.B. did not feel his ex-wife was caring for the children properly, and he wanted to modify the custody arrangements. 1RP 77. He could not afford an attorney to advise and assist him, however, so he undertook the task on his own. 1RP 50, 136-37. M.B. prepared a letter of intent to modify the parenting plan, entitled "Notice of Estoppel by

Acquiescence," stating that he believed his children were being abused and he intended to remove them from his ex-wife's custody. 1RP 65; 2RP 187-91. T.L.S. served the letter on M.B.'s ex-wife and the Tacoma police. 1RP 58; 2RP 187. When M.B.'s ex-wife did not respond to the letter, M.B. and T.L.S. believed they had her permission to pick up the children. 1RP 48, 80.

On January 23, 2007, T.L.S. and M.B. picked up M.B.'s youngest four children on their way to school and brought the children back to their home in Olalla. 1RP 34-37, 85-87. T.L.S.'s seven children were also at home with them. 1RP 38. The police arrived later that afternoon, saying they were there to pick up M.B.'s children. 1RP 50. M.B. and T.L.S. asked if the police had a warrant to be on the property and to remove the children and asked them to leave until they obtained one. 1RP 17, 38. After six hours, a warrant was presented and the children were released. 2RP 184, 197-98. In the intervening time, two SWAT teams surrounded the house, eventually joined by a tank. 1RP 37-38, 98; 2RP 195. There was no indication that anyone in the house was ever armed. 3RP 398.

M.B. and T.L.S. were arrested, and T.L.S.'s seven children were taken into custody. 2RP 199. T.L.S. remained in jail until August, 2007, when she pleaded guilty to attempted custodial interference and violation

of a protection order. 1RP 28, 53. Her goal in entering the plea was to get out of jail so that she could take care of her children. 1RP 19, 53.

The department filed dependency petitions alleging that the children had no parent capable of adequately caring for them, such that there was a danger of substantial damage to the children's psychological or physical development. CP 28-34, 78-84, 96-102, 113-120, 133-139, 152-158, 171-177.

At the fact-finding trial, the department focused on what it termed the "standoff" with law enforcement on January 23, 2007, and its effect on the children. The CPS investigators who interviewed the children believed that the incident with the police was traumatic for the children. 2RP 232, 246-47. The social worker also testified that, in her opinion, the children had been traumatized, although she did not know the nature or extent of any psychological damage, because the department had not arranged counseling for the children in the nine months since they were removed from their parents' care. 2RP 297, 313-14. Nonetheless, the social worker noted that the children were fairly well-adjusted and that the grandmother and aunt with whom they were placed did not see the need for counseling until T.S. began acting out after a change in placement. 2RP 324, 331.

The social worker testified that the department's principle concern for the children was the trauma and potential psychological damage from the incident on January 23, 2007. 2RP 331. When the six older children were interviewed the next day, some said they had been scared during the incident. 2RP 243, 295. None of the children said they were afraid of T.L.S., however, or that they had not been fed, clothed, or provided with housing. 2RP 249. A.B. was only eight months old at the time, and the CPS investigator who observed him the day after the incident testified that he was clean, well-nourished, and in no apparent distress. 2RP 238.

The guardian ad litum testified that the children were well-mannered, well-dressed, and obviously well-brought-up by T.L.S. 2RP 342. The children seemed pretty normal, except for T.S., who was having behavior issues related to being moved from one placement to another. 2RP 337, 349.

The DSHS court worker who filed the dependency petitions believed the children were at risk because the parents had not accepted responsibility for placing their children in a substantial risk of harm on January 23, 2007. 2RP 263-64. She was not sure whether a similar incident would occur if the children were returned home. 2RP 264. She testified that she believed there was a risk to the children, and she wanted the parents to do assessments to confirm that belief. 2RP 271.

T.L.S. acknowledged at the trial that the children were potentially in danger during the standoff because law enforcement officers outside their home were armed. 1RP 24. But at the time they picked up M.B.'s children she did not believe they were doing anything wrong, and she did not expect the police to show up at her house that day. 1RP 49.

T.L.S. explained that she knew from reading the constitution that law enforcement cannot enter a person's home without a warrant. Because the police did not have a warrant, a writ of habeas corpus, or a pickup order when they first came to the house, she did not let them enter. Instead, she exercised her right to require documentation. 1RP 51. The officers told her they would have to get a warrant, and what was described as a six-hour standoff was actually the time it took for law enforcement to produce the correct documentation. 1RP 53.

T.L.S. testified that if she had known in January about custodial interference, she would have made different choices. She is now aware that there is a process that must be followed in order to modify custody and visitation. 1RP 50.

The trial court granted the dependency petitions. It found that M.B. started a chain of events which led to the police taking the children when he violated the terms of protection orders. 3RP 396. The court also found that T.L.S. participated in M.B.'s actions. 3RP 394. The court

found that the illegal act of taking M.B.'s children in violation of protection orders was sufficient to establish dependency, in that the parents put their political agenda ahead of the children's safety. Although the evidence showed that only the police were armed, the court did not believe it mattered who created the risk, because the parents could have de-escalated the situation by surrendering sooner. 3RP 397-98.

Following its oral ruling, the court entered written findings of fact, including the following:

> 5. The decision by [M.B.] and [T.L.S.] to knowingly violate court orders and take [M.B.'s children] was an illegal act, and this alone is sufficient for a finding of dependency as to [A.B.], [C.S.], [T.S.], [A.M.S.], [A.S.], [J.S.], and [B.S.]….
> …
> 7. The standoff with police was a dangerous situation for the children in the home, and [the children] were therefore at risk during the standoff, but that risk could have been de-escalated.
> 8. The police standoff and its eventual conclusion may have been a traumatic experience for the children in the home, although it is unlikely that A.B. was traumatized given his age.
> 9. …[B]oth [M.B] and [T.L.S.] have demonstrated they have placed their political agenda above the safety of their children.
> 10. As a result of the findings outlined in numbers 1-9 immediately above, there is a concern that the decision-making of [M.B.] and [T.L.S.] places [the children] in dangerous situations; court supervision is necessary to address this concern.

CP 15-16.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO FIND THE CHILDREN DEPENDENT.

a. Due process concerns limit the state's right to interfere in the family relationship.

Parental rights are a fundamental liberty interest protected by the constitution. Santosky v. Kramer, 456 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982). The United States Supreme Court has defined the parent-child relationship as "essential" and "far more precious" than property rights. Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). The Washington Supreme Court has agreed that it is " more precious . . . than life itself." In re Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1975).

The procedures set forth in RCW 13.34 reflect a fundamental policy of preserving the relationship between parents and children. In re Sumey, 94 Wn.2d 757, 761, 621 P.2d 108 (1980). "The legislature declares that the family unit is a fundamental resource of American life which should be nurtured." RCW 13.34.020. This constitutionally protected interest may not be abridged except for the most powerful reasons. In re Day, 189 Wash. 368, 382, 65 P.2d 1049 (1937). "[C]ourts undertake a grave responsibility when they deprive parents of the care,

custody and control of their natural children." In re Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973).

Thus, the state may disturb the family unit only to protect a child's right to conditions of minimal nurture, health and safety. RCW 26.44.010; In re Frederiksen, 25 Wn. App. 726, 734, 610 P.2d 371 (1979). Our courts have emphatically repudiated the view that "all children are wards of the State and that the State and its agencies have an unhampered right to determine what is best for a child." In re May, 14 Wn. App. 765, 766, 545 P.2d 25, review denied, 87 Wn.2d 1006 (1976). The state may not disrupt and destroy the family unit simply because the child might have a better home with someone else. Rather, the court must determine whether the parent's conduct has been such that he has abdicated or forfeited his parental rights. In re May, 14 Wn. App. at 768 (citation omitted).

b. The State failed to prove by a preponderance of the evidence that the children are dependent.

When a child's physical or mental health is seriously jeopardized by parental deficiencies, the state has the right and responsibility to intervene and protect the child. In re Dependency of Schermer, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). But when the state files a dependency petition, it has the burden of proving by a preponderance of

the evidence that parental deficiencies constitute a danger to the child. Schermer, 161 Wn.2d at 942; RCW 13.34.130.

To evaluate a claim of insufficient evidence of dependency, the reviewing court must determine whether substantial evidence supports the court's findings of fact and whether the findings support the conclusions of law. Dependency of M.P., 76 Wn. App. 87, 90, 882 P.2d 1180 (1994), review denied, 126 Wn.2d 1012 (1995). "[E]vidence is substantial if, when viewed in the light most favorable to the party prevailing below, it is such that a rational trier of fact could find the facts in question by a preponderance of the evidence." Dependency of M.P., 76 Wn. App. at 90-91.

The court below found that the children are dependent under RCW 13.34.030(5)(c). CP 17. That statute defines a "dependent child" as any child who:

> Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

RCW 13.34.030(5)(c).

While parental unfitness is not an absolute prerequisite to a dependency, under the terms of the statute it is clear that a dependency

determination requires a showing of parental deficiency. Schermer, 161 Wn.2d at 943. The state failed to prove a parental deficiency in this case.

The evidence was uncontroverted that the children were well-mannered, well-dressed, well-nourished, and obviously well-brought-up by T.L.S. 2RP 238, 249, 342. Significantly, when pressed, the social worker was unable to identify any parental deficiency. She indicated only that parenting classes would help the parents understand the situation they placed their children in and that a psychological assessment would determine if there were any issues. 2RP 332-33. The most the state's witnesses could say was that they believed there were risks to the children and they wanted to do assessments to confirm those beliefs. 2RP 271, 294.

As M.B.'s counsel argued in closing, "the State claims they need a dependency to figure out effectively whether or not they need a dependency." 3RP 390. The statute simply does not support an order of dependency under these circumstances. It is not sufficient to prove that there might be parental deficiencies. Rather, the state has the burden of proving that such a deficiency exists and that the deficiency places the children in danger. The state did not meet this burden.

The primary concern of the department and of the court was the decision-making that led to the incident on January 23, 2007. In fact, the

court indicated that the decision to violate protection orders as to M.B.'s children was alone sufficient to establish dependency. CP 15. There is no support for this conclusion. Past illegal conduct does not in and of itself establish dependency. See In re Brown, 149 Wn.2d 836, 841, 72 P.3d 757 (2003) (past history is only one factor to be considered in determining current parental fitness); In re Dependency of J.B.S., 123 Wn.2d 1, 11-12, 863 P.2d 1344 (1993) (criminal history alone does not disqualify parent from having custody of children).

The finding of dependency was based on a single incident which occurred nine months earlier. There was no evidence of similar conduct by T.L.S., either before or since. T.L.S. testified that her actions were motivated by an uninformed belief regarding custody modification, she served eight months in jail as a consequence, and if she knew at the time what she now knows about custodial interference, she would have made different choices. 1RP 50. Furthermore, the court specifically noted that T.L.S. had demonstrated her ability to protect her children, finding that she acted appropriately in removing them from the home when her ex-husband was accused of molesting two of the girls. CP 16.

Moreover, the evidence did not establish that T.L.S.'s admittedly poor decision-making on January 23, 2007, constituted a danger of substantial damage to the children's development. The CPS investigators

who interviewed the children the next day said they thought the incident was traumatic for the children. The older children appeared shaken and scared by the previous day's events, although A.B. showed no signs of distress. While the state argued that this evidence showed there was a substantial risk of psychological damage, the evidence did not support that argument.

In fact, the social worker testified that the children were well-adjusted, and there was no evidence that the children were affected by the incident beyond the following day. 2RP 324. The department never obtained any psychological assessments of the children, and the relatives with whom they were placed did not see a need for counseling until T.S. began acting out after a change in placement. 2RP 324, 331. Thus, the state failed to show that the incident created a danger of substantial damage to the children's psychological development which necessitated court supervision.

The Legislature has declared that "the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized." RCW 13.34.020. Because the state failed to establish that the children's physical or mental health is seriously jeopardized by parental deficiencies, the order of dependency must be reversed. See Schermer, 161 Wn.2d at 941.

D. CONCLUSION

The state failed to prove by a preponderance of the evidence that the children are dependent, and the order of dependency must be reversed.

DATED this 15th day of May, 2008.

Respectfully submitted,

_____
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APPENDIX